

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0328**

*Reversed ~ No Disqualification*  
*Revocada ~ No Descalificación*

*Esta decisión concluye que el reclamante fue despedido pero no por mala conducta y no está descalificado para recibir beneficios del seguro de desempleo basado en la separación laboral. Partes de esta decisión están traducidas al español. Sin embargo, hay información importante en esta decisión que aparece solo en inglés con respecto a por qué la Junta de Apelaciones de Empleo (EAB, por sus siglas en inglés) determinó que el reclamante fue despedido pero no por mala conducta. Si necesita interpretación en español de la parte de esta decisión que aparece en inglés, puede obtenerla llamando a la EAB al 503-278-2077 y solicitando un intérprete de español.<sup>1</sup>*

**PROCEDURAL HISTORY:** On February 1, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective November 12, 2023 (decision # 144935). Claimant filed a timely request for hearing. On March 8, 2024, ALJ Christon conducted a hearing, interpreted in Spanish, at which the employer failed to appear, and on March 21, 2024 issued Order No. 24-UI-250662, affirming decision # 144935. On March 29, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

**HISTORIA PROCESAL DEL CASO:** *El 1 de febrero de 2024, el Departamento de Empleo de Oregon (el Departamento) mandó por correo una decisión administrativa que concluye que el reclamante fue despedido por mala conducta y, por lo tanto, fue descalificado para recibir beneficios del seguro de desempleo a partir del 12 de noviembre de 2023 (decisión # 144935). El reclamante presentó una solicitud de audiencia a tiempo. El 8 de marzo de 2024, Jueza Administrativa (ALJ) Christon llevó a cabo una audiencia, interpretada en español, en la que el empleador no se presentó. El 21 de marzo de*

<sup>1</sup> This decision concludes that claimant was discharged, but not for misconduct, and that claimant is not disqualified from receiving unemployment insurance benefits based on the work separation. Portions of this decision are translated into Spanish. However, there is important information in this decision that appears only in English regarding why the Employment Appeals Board (EAB) determined that claimant was discharged, but not for misconduct. If you require Spanish interpretation of the portion of this decision that appears in English, you can obtain that by calling EAB at 503-278-2077 and requesting a Spanish interpreter.

2024, la ALJ emitió la Orden No. 24-UI-250662, confirmando la decisión # 144935. El 29 de marzo de 2024, el reclamante presentó una solicitud de revisión ante la Junta de Apelaciones de Empleo (EAB).

**FINDINGS OF FACT:** (1) Southern Cal Transport employed claimant as a truck driver from December 3, 2014, until November 13, 2023.

(2) The employer expected that their drivers would not unlawfully use a mobile electronic device while driving. The employer presented claimant with a written copy of their policy and issued claimant a device that attached to the windshield of the truck to hold his telephone for hands-free use in connection with the truck's audio system. The employer also expected that their drivers would make and answer work-related calls while driving. Claimant understood these expectations.

(3) In early 2023, the employer observed claimant, via cameras installed in the truck he drove, holding a mobile telephone in his hand while driving. The employer suspended claimant from work for three days for this incident.

(4) On November 9, 2023, claimant reported for work between 2:00 and 3:00 a.m. Claimant realized when he arrived that he had forgotten to bring the telephone holder issued by the employer. Claimant could not obtain a replacement at that time because no other employees were working at that hour. Claimant therefore put his telephone in the truck's cupholder. Claimant believed that momentarily manipulating the telephone to connect and disconnect calls using the truck's audio system while driving did not violate the employer's electronic device use policy. The employer later observed camera footage of claimant pressing a button on the telephone for "two seconds" to make or receive a work-related call while it was in the cupholder. Transcript at 17.

(5) On November 13, 2023, the employer discharged claimant because they believed that his actions on November 9, 2023, violated their electronic device use policy.

**CONCLUSIONS AND REASONS:** Claimant was discharged, but not for misconduct.

**CONCLUSIONES Y RAZONES:** *El reclamante fue despedido, pero no por mala conducta.*

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (September 22, 2020). "[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). Good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

ORS 811.507 provides, in relevant<sup>2</sup> part:

(1) As used in this section:

\* \* \*

(b) “Hands-free accessory” means an attachment or built-in feature for or an addition to a mobile electronic device that gives a person the ability to keep both hands on the steering wheel at all times while using the device or requires only the minimal use of a finger, via a swipe or tap, to activate or deactivate a function of the device.

\* \* \*

(d) (A) “Mobile electronic device” means an electronic device that is not permanently installed in a motor vehicle.

(B) “Mobile electronic device” includes but is not limited to a device capable of text messaging, voice communication, entertainment, navigation, accessing the Internet or producing electronic mail.

(e) “Using a mobile electronic device” includes but is not limited to using a mobile electronic device for text messaging, voice communication, entertainment, navigation, accessing the Internet or producing electronic mail.

(2) A person commits the offense of driving a motor vehicle while using a mobile electronic device if the person, while driving a motor vehicle on a highway or premises open to the public:

(a) Holds a mobile electronic device in the person’s hand; or

(b) Uses a mobile electronic device for any purpose.

\* \* \*

(3) It is an affirmative defense to a prosecution of a person under this section that the person:

(a) Used the mobile electronic device to communicate if the person was summoning or providing medical or other emergency help if no other person in the vehicle was capable of summoning help;

(b) Was 18 years of age or older and was using a hands-free accessory;

\* \* \*

---

<sup>2</sup> The statute also contains provisions and exemptions applicable to the operation of certain types of commercial vehicles that are governed by federal regulations. *See* ORS 811.507(3). It is not established in the record whether the vehicle claimant drove would make these provisions applicable.

\* \* \*

The employer discharged claimant because they believed that he violated their electronic device use policy. The employer reasonably expected that their employees would not unlawfully use a mobile electronic device while driving. Claimant testified that after his suspension for hand-held telephone use in early 2023, “[T]hey did tell me that we could not grab hold of the phone for no reason whatsoever. Although one of their own requirements is that . . . we have to be in constant communication with them.” Transcript at 15. This suggests that the employer’s electronic device use policy may have been more restrictive than state law governing electronic device use, and may have prohibited all hands-free telephone use except when the telephone was being held by the mounting device the employer issued. Nonetheless, the record does not show that claimant violated the policy or state law willfully or with wanton negligence.

The order under review concluded that claimant committed a willful or wantonly negligent violation of the employer’s reasonable expectations by “placing his phone in his truck’s cup holder and briefly holding the cellphone to use it to answer a call from a customer.” Order No. 24-UI-250662 at 3. The record does not support this conclusion.

Claimant testified that on November 9, 2023, he “forgot to bring into work” the device provided by the employer to hold his telephone, which attaches to the truck’s windshield. Transcript at 6. The record does not suggest that this was a conscious decision or that claimant was indifferent to the consequences of failing to bring the device to work. Therefore, claimant’s failure to bring the device to work constituted no more than ordinary negligence.

Once claimant arrived at work without the device and was unable to obtain a replacement, claimant put the telephone in the truck’s cupholder and connected it to the truck’s hands-free audio system. Had claimant not done this, he would have violated another of the employer’s expectations: that he answer customer calls while driving. Claimant testified that he believed he could not pull over and stop driving to answer calls “because we have a certain amount of time, limited time, to be driving. So we really do not do this[.]” Transcript at 15. This suggests that claimant faced a situation that day where he might be forced to violate one or another of the employer’s expectations when the need to make or answer a call arose.

Claimant testified that a customer called his telephone as he neared the end of his driving route that day, and he “press[ed] the button to answer the call.” Transcript at 6. He explained, “I only held it two seconds in order to press the button.” Transcript at 16. Claimant also testified that, regarding his conversation with the employer about what they viewed in the video, “[O]nce I pressed the phone and pressed the button, that is when they said to me that I grabbed hold of the phone.” Transcript at 8. Claimant elaborated, “[H]ad the phone been [held by the employer’s device] I still would have needed to press the button. However, I wouldn’t have held the phone. So that is the difference.” Transcript at 8. Claimant further testified, “I did grab hold of it, but only to press – to look at the phone to press the button. And then . . . I put it back in the cup holder.” Transcript at 10. However, claimant later clarified, “[I]t only took me two seconds to press the button and I never held it in my hand. It was just the two seconds to press the button.” Transcript at 16.

ORS 811.507(2) prohibits “hold[ing] a [telephone] in [a] person’s hand” or using it “for any purpose” while driving. The statute exempted claimant from that prohibition, however, if he was using a feature of the telephone or truck that gave him “the ability to keep both hands on the steering wheel at all times while using the device or requires only the minimal use of a finger, via a swipe or tap, to activate or deactivate a function of the device.” ORS 811.507(1)(b); (4)(b). Claimant’s testimony was somewhat contradictory in this respect and the record is therefore unclear as to the extent claimant manipulated the telephone to answer the call. In his later testimony, however, claimant explicitly denied holding the telephone in his hand. Transcript at 16. Further, if claimant merely pressed a button on the telephone or the telephone’s screen to take or end the call in a matter of two seconds, as portions of his testimony indicated, the evidence is no more than equally balanced as to whether claimant’s actions fell within the statute’s hands-free use exemption. The employer, who did not appear at the hearing, has therefore not shown by a preponderance of evidence that claimant unlawfully used the telephone while driving in violation of their policy.

Moreover, even if the employer had shown that claimant’s use of the telephone violated the law or their more restrictive policy, they have not shown that claimant knew or should have known that his brief contact with the telephone—in the same manner that was explicitly allowed if the employer’s mounting device was utilized—would not fall within the law’s hands-free use exemption, or would violate the employer’s policy. Claimant testified that he “never really thought that this would be a cause or reason to fire me after so many years of work” despite his discipline earlier in the year for unlawfully holding his telephone while driving. It is reasonable to infer that the employer’s expectation as to precisely what claimant was permitted to do with the telephone to communicate with customers as required, in the absence of the employer-provided mounting device, had not been explained to claimant. The record therefore does not show that claimant knew or should have known that his actions would violate the employer’s reasonable expectations.

Claimant earnestly believed, based on his past discipline from the employer for holding a telephone while driving, that his contact with the telephone on this occasion did not constitute “holding” the telephone within the meaning of either the employer’s policy or the law. He also believed, with good reason, that his actions were furthering the employer’s interests by maintaining communication with a customer despite not having the mounting device, and that he did so in a way that was apparently as safe and lawful as if he had used the mounting device. At worst, claimant’s differing understanding from the employer of what constituted “holding” a telephone was a good faith error, which is not misconduct.<sup>3</sup> Accordingly, the employer has not met their burden to show that claimant’s actions on November 9, 2023 constituted a willful or wantonly negligent policy violation. Claimant was therefore not discharged for misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

---

<sup>3</sup> See, e.g., *Freeman v. Employment Dep’t.*, 195 Or App 417, 98 P3d 402 (2004) (a good faith error analysis focuses on the conduct, not the result; for example, whether it was good faith error for claimant to believe he was not under the influence of intoxicants when he drove home, rather than whether the employer would tolerate him driving while under the influence); see accord *Goin v. Employment Dep’t.*, 203 Or App 758, 126 P3d 734 (2006).

**DECISION:** Order No. 24-UI-250662 is set aside, as outlined above. *La Orden de la Audiencia 24-UI-250662 se deja a un lado, de acuerdo a lo indicado arriba.*

S. Serres and D. Hettle;  
A. Steger-Bentz, not participating.

**DATE of Service:** May 10, 2024

**FECHA de Servicio:** 10 de mayo de 2024

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

*NOTA:* Esta decisión revoca una orden judicial que negó beneficios. Por favor tenga en cuenta que, si le deben beneficios, el Departamento puede tomar aproximadamente una semana para pagar esos beneficios.

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. See ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

*NOTA:* Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Vea ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

**Por favor, ayúdenos mejorar nuestros servicios completando un formulario de encuesta sobre nuestro servicio de atención al cliente.** Para llenar este formulario, puede visitar <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. Puede acceder a la encuesta usando una computadora, tableta, o teléfono inteligente. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.



# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار .

**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.